IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CONFIRMATION CASE NO.1 OF 2005

State of Maharashtra — Complainant

Vs.

1. Dnyaneshwar Suresh Borkar

2. Amit @ Bapu Nanasaheb Bhandwalkar — Accused.

WITH

CRIMINAL APPEAL NO.618 OF 2005

Shri Dnyaneshwar Suresh Borkar — Appellant (Org.Accused No.1)

Vs.

State of Maharashtra & anr. — Respondents

WITH

CRIMINAL APPEAL NO.38 OF 2005
AND
CRIMINAL APPLICATION NO.4389 OF 2005
(FOR SEPARATING TRIAL)

Amit @ Bapu Nanasaheb Bhandwalkar — Appellant/ Applicant (Org.Accused No.2)

Vs.

State of Maharashtra — Respondent

Mr Vijay Sawant, Spl.P.P. with Mrs. P.H. Kantharia, APP for State.

Mr. Abhaykumar Apte, Advocate appointed and Mr.M.S.Mohite with Mr.D.M.Gupte for accused no.1.

Ms.Pranali Kakade for accused no.2.

CORAM: B.H.MARLAPALLE & SMT.R.S.DALVI,JJ.

Reserved for Judgment on: 7th April 2006.
Judgment pronounced on : 5th May, 2006.

JUDGMENT (Per B.H.Marlapalle,J.):

1. The Confirmation Case under Section 366 and the Appeals under Section 374 of Cr.P.C. arise from the order of conviction and sentence dated 18th December 2004 passed by the learned Addl. Sessions Judge at Pune in Sessions Case No.236 of 2001. Though there were three accused initially, the trial against accused no.3, who was a juvenile accused, was separated and, therefore, accused nos.1 and 2 came to be tried in the said Sessions Case for the offences punishable under Sections 120B, 364A simplicitor or Section 364A read with Section 34, Section 302 simplicitor or Section 302 read with Section 34, Section 201 simplicitor or Section 201 read with Section 34, Section 384 simplicitor or Section 384 read with Section 34 and Section 506 simplicitor or Section 506 read with Section 34 of IPC. The learned Addl. Sessions Judge was pleased to acquit both the accused for the offences punishable under Section 120B, Section 384 read with Section 34, Section 506

read with Section 34, Section 364A read with Section 34 or simplicitor under all these Sections. However, accused no.1-Dnyaneshwar Suresh Borkar was found to be guilty of the offence punishable under Section 302 and he has been sentenced to death (hanging till death), subject to confirmation under Section 366 of the Code by this Court. Accused no.1-Dnyaneshwar has also been found guilty for the offence punishable under Section 364 of IPC and has been sentenced to imprisonment for life and to pay a fine of Rs.5000/-, in default thereof to suffer RI for six months. Accused no.2-Amit @ Bapu Nanasaheb Bhandwalkar has been found to be guilty of the offence punishable under Section 302 read with Section 34 and has been sentenced to life imprisonment and to pay a fine of Rs.5000/-, in default to suffer RI for six months. Both the accused have been found guilty for the offence punishable under Section 201 read with Section 34 of IPC and each of them has been sentenced to suffer RI for five years and to pay a fine of Rs.5000/-, in default to suffer RI for six months. Subject to the provisions of Section 31 of the Cr.P.C., the substantive sentences of imprisonment (excluding the death sentence) have been directed to run consecutively in the order they are given.

2. Dr.Ashok Mainkar - Gynaecologist and his wife Dr.Ashwini Mainkar - Ophthalmologist, who were amongst about 30 to 40 medical practitioners at Saswad, Purandar taluka, were blessed with two children - daughter-Ruta aged 14 years and son-Rishikesh aged 13 years at the relevant time and today they are a childless couple. On 4th February 2001 Dr.Mainkar left his home at Saswad for Pune between 4-30 and 5 p.m. to pick up his wife who was attending a medical transcription class and when he returned at 10 p.m. his daughter Ruta was waiting in the porch and informed that Rishikesh who had left home to attend the computer class at 6 p.m. had not returned till then. Little did the doctor know at that time that his son Rishikesh was kidnapped and murdered for a ransom. His daughter Ruta, while a college student at Pune, could not bear the shock of her brother's gruesome murder, and committed suicide in October 2003.

. The doctor started making enquiries about his son's whereabouts from his teacher at the computer class as well as friends and around 11 p.m. went to

the Saswad police station to inform the police but was sent back by the duty police constable with a belief that the minor son must have gone out with one of the friends and would return may be late in the night or early morning. On 5th February 2001 when the doctor could not get any clue about the whereabouts of his son, he went to the police station around 10 a.m. and filed a missing report (Exhibit 122) on the basis of which PSI Kshirsagar (PW 41) of Saswad Police Station issued an alert call (Exh.140) to all the neighbouring police stations. On 4th February 2001 Rishikesh had left his home at about 6 p.m. on a Hercules bicycle, wearing wrist watch of Escort make with an apparel of greyish black colour jeans trouser and yellowish chocolate colour strip T-shirt. On 5th February 2001 the doctor couple continued their search for Rishikesh at various places but in vain. Ruta had received a call on 4th February 2001 at about 8 p.m. from a boy named Jagtap who had informed her that Rishikesh was with him and would return on the next day. Around 8.40 p.m. on 5/2/2001 he received a telephone call from a person who did not disclose his name but told the doctor "Tumhara bachha hamare pas hai. Internet khel raha hai, hamne use kuch nahi kiya". When the doctor

told the caller to return his son, the caller told the doctor to keep an amount of Rs.5 lakhs ready by next day morning. The doctor was advised not to inform the police and threatened "Amchyashi gath aahe" (You have to face us). On 6th February 2001 the doctor approached the police station once again at about 6 a.m. and informed about the telephone call. This complaint was also reduced in writing (Exhibit 123), and subsequently treated as the FIR. In the mean while the police officer had contacted the telephone engineer and requested him to keep the doctor's telephone no.22553 under surveillance (the number was common for the residence as well as the hospital). Two police constables were posted at the doctor's house to monitor his telephone from 6th February 2001 onwards. At about 6.45 p.m. the doctor received a call from the same person who had called him on the earlier day and the caller disclosed his name as Salimbhai. The caller asked the doctor "Hamara kam kiya kya" and the doctor answered in the affirmative and requested the caller to hand over the phone to his son. The doctor was informed on phone that his son was playing on internet and he could talk to him after one hour. The doctor was again threatened not to contact the

police and the caller disconnected the phone. The phone was monitored by the police. On 7th February 2001 the same person called the doctor at about 7.15 a.m. and asked whether the money was ready. The doctor informed him that the money was ready on the earlier day itself but nobody came to collect. The caller disclosed that he was busy and would contact the doctor around 12 noon. He received the second call at 7 p.m. and in the mean while nobody came to collect the money. In this call also the caller disclosed his name as Salimbhai and angrily asked the doctor why he had informed the police about the demand of Rs.5 lakhs. He also enquired with the doctor whether the telephone was tapped and threatened him with the consequences including elimination of his son and the entire family. The doctor was informed that on 8th February 2001 some unknown person would meet him at 12 noon and collect the money of Rs.5 lakhs and thereafter Rishikesh will be released. Both these telephone calls received on 7th February 2001 were monitored. On 8th February 2001 the doctor received the first call at 12.30 noon and the caller disclosed his name as Salimbhai and informed the doctor that the person would come to collect the money at 1 p.m. The second call came

between 1-45 p.m. and 2 p.m., whereas the third call was received at 3.30 p.m. when the caller shouted at the doctor and told him that his man had visited the hospital and found the police around it. The fourth call was received at 4 p.m. from the same Salimbhai informing the doctor that he was calling from Hadapsar, Pune and the money was required to be kept near the junk jeep lying in front of a small temple on the Pune - Jejuri road after village Belsar and on which the slogan "Chalo Nashik" was written. The doctor agreed and the phone was disconnected. This call was also monitored. Salimbhai called the fifth time at 5 p.m. and uttered only one sentence, "my man will not come" and the phone was cut off. The caller was taken in custody between 5.30 to 6 p.m. on 8th February 2001 by Ashok Dagadu Kshirsagar (PW-41) PSI, Saswad police station at the relevant time by drawing arrest panchanama at Exhibit 46, from the road near Jejuri side octroi post at Saswad. His house search was made to find out whether Rishikesh was confined / locked in the house but the police did not find Rishikesh and they had to be satisfied by seizing the clothes of the arrested accused no.1, under seizure panchanama (Exhibit 47). On 9th February 2001 and as per the disclosure made by

accused no.1 while in police custody, the police team went to the agricultural farm of accused no.1 at village Kumbhar valan which is also known as "chaver" and the accused no.1 showed the place where the dead body of Rishikesh was buried. The dead body was exhumed from the pit at about 9 a.m. and was found to be in a deteriorated condition. Dr.Mainkar was called and he identified the dead body to be of his son Rishikesh.

3. The police continued with the interrogation with accused no.1 and accused no.2 was arrested on 18th February 2001 along with the third accused Nilesh who was a juvenile under arrest panchanama Exh. 54. During the course of investigations statements of a number of persons were recorded, articles were recovered including the two-wheeler of accused no.1 and bicycle of Rishikesh.

. On completion of the investigation, charge-sheets were filed against two accused on 2nd May 2001 before the learned Judicial Magistrate, First Class at Saswad who in turn committed the accused persons for trial to the Sessions Court at Pune on 6th July 2001. The charge was framed

(Exhibit 5) on 14/12/2001 and the prosecution examined in all 41 witnesses. The accused did not examine any witnesses in their defence and their statements under Section 313 of Cr.P.C. (Exhibit 6 and Exhibit 7/2) were recorded on 3rd December 2004. As per the learned Sessions Judge the prosecution proved its case against the accused persons on the basis of the circumstantial evidence. As per the prosecution the chain of circumstances unerringly proved before the trial Court is as under:

(a) preparation for digging a pit by collecting the digging / burying equipments like arrow (fawda), tikas for burying the dead body;

(b) purchase of salt to be used for burying the dead body on two different dates and from two different shops;

(c) deceased Rishikesh last seen by Dr.Mainkar between 4 to 5 p.m. on 4/2/2001 and Rishikesh leaving the house at 6 p.m. on that day to go to Aptech Computer Institute as was seen by his sister-Ruta;

(d) Rishikesh met in Aptech Computer Institute to Atul (PW 26) around 6 p.m. and enquired about Rohit Jagtap. Accused no.1 had sent Dattatray Tupe (PW 25) to call Rishikesh from Aptech Computer Institute at 6 p.m. on 4/2/2001 and Dattatraya had gone to the said Institute but did not find Rishikesh there. PW 25 met Rishikesh in the company of accused no.1 immediately thereafter and he saw accused no.1 taking Rishikesh on his M-80. At that time Rishikesh was sitting on the rear seat of M-80 and accused no.1 was driving the said vehicle;

(e) all the three accused seen by Vimal Borkar (PW 22) while going on M-80 and accused no.1 at about 7 p.m. coming from village Vir side and going through village Ambodi. Accused no.1 was driving the vehicle. Rahul Borkar (PW 23) had seen all the accused on 4/2/2001 at about 7.30 p.m. going on the M-80 of accused no.1 while the witness was sitting at the katta near Yeshwantrao temple along with his friends. Accused no.1 was driving the vehicle and they proceeded towards Saswad. Chandrakant Yadav (PW 21) had served tea to all the accused in the tea stall run by his maternal uncle Shri Tanaji Nivrutti Kamthe at Saswad at about 7.45 p.m. on 4/2/2001;

(f) At 8 p.m. on 4/2/2001 Ruta had received a telephone call from a person called Jagtap informing her that Rishikesh was with him and he would return in the morning of the next day. Dr.Mainkar returned from Pune at about 10 p.m. on 4/2/2001 and was informed by Ruta that Rishikesh had not returned from the Computer class;

(g) Dr.Mainkar receiving the first telephone call at 8-40 p.m. on 5/2/2001 demanding a ransom of Rs.5 lakhs to release Rishikesh and on his complaint with the police station in the early hours of 6/2/2001 the Police Inspector directing the telephone tapping of Dr.Mainkar with the help of Asst. Engineer (Telephones);

(h) complaint at Exhibit 123 registered and police constables posted at the house of Dr.Mainkar to monitor the telephones;

(i) on 6/2/2001 second telephone call at 6.45 p.m. received by Dr.Mainkar from a person called Salimbhai asking whether the amount was kept ready and threatening not to report to the police;

(j) on 7/2/2001 two telephone calls received by Dr.Mainkar, the first call at 7.15 a.m. and the second call at 7 p.m. On 8/2/2001 Dr.Mainkar received in all five telephone calls starting from 12.30 noon and the last call was at 5 p.m. from the same Salimbhai. All the calls were monitored and after the last call the accused no.1 was taken in custody, with Jotiba Ingawale (PW 40) alerting the police after the accused no.1 had made the telephone call at 4 p.m.

(k) seizure of clothes of the accused and recovery of bicycle (article 28) in the night of 8/2/2001;

(l) recovery of Herculus bicycle used by Rishikesh to go to Aptech computer class, in the midnight on 8/2/2001 from a well.

(m) recovery of the dead body of Rishikesh on 9/2/2001 between 8 to 9 a.m. with one clutch wire seen around the neck of the deceased. Photographs taken by camera as well as video shooting also done;

(n) recovery of wrist watch (article 18) worn by

the deceased on 11/2/2001 from the house of accused no.1, and recovery of wallet of the deceased (article 19) from the house of PW 27-Sudhakar and recovery of M-80 of accused no.1 from Khalad-Jejuri road;

(o) recovery of the chappals (article 20) worn by the deceased from the well on the road from Ambodi to Waghapur chouphala;

(p) recovery of Ghamele on 23/2/2001;

(q) recovery of tikas on 23/2/2001;

(r) accused no.1 met Sudhakar (PW 27) and had hidden the wallet of the deceased behind a photoframe in his house. PW 29-Pramod was asked to collect money from Dr.Mainkar on 6/2/2001 but he declined to search for a suitable man to collect the ransom from Dr.Mainkar; and

(s) on 7/2/2001 the accused no.1 sold his gold chain and fetched an amount of Rs.520/- which amount he required to hire a person to collect the ransom amount from Dr.Mainkar.

(t) On 8/2/2001, the accused no.1 hired a person from Hadapsar and brought him to Saswad at about 4.30 p.m. under guise to work in the sugarcane juice shop and when he was told to go and pick up the bag, he had refused.

In addition the prosecution case is based on extra judicial confession made by accused no.1 to Pramod Tekawade (PW 29), extra judicial confession made by accused no.2 to Gokul Khomane (PW 28) and the one made by accused no.3 to Rahul Borkar (PW 23).

4. The printed paper book in Confirmation Case No.1 of 2005 suffers from serious printing mistakes. For example on Issue No.7 framed in para 4 of the impugned judgment, the printed paper book records the findings in the affirmative whereas in the original judgment the findings recorded by the learned trial Judge on the said issue are in the negative and that is also clear in the operative part of the order of conviction and sentence. Wherever there was doubt or difficulty in appreciating the oral depositions appearing in the printed paper book, we have referred to the original Marathi depositions of the concerned witnesses keeping in mind the fact that the oral

depositions before the trial Court of the local witnesses are recorded in Marathi and they are simultaneously translated in English by the learned Presiding Officer. In case the oral depositions are in a language other than Marathi, the learned Presiding Officer translates the same in Marathi and this recording of oral depositions simultaneously in Marathi and English is followed by almost all the Sessions Courts in the State. We also have the advantage of Shri Vijay Savant, the learned Special Prosecutor before us who also acted in the same capacity before the trial Court.

5. Saswad is a town located on the Pune-Jejuri Road with a population of about 25 to 30 thousand at the relevant time and is about 40 Kms. away from Pune and about 10 Kms. before Jejuri. The accused are the residents of village Ambodi which is at a distance of about 2 1/2 to 3 Kms. from Saswad (on the North Eastern side) and it is not uncommon that the residents of Ambodi walk down to Saswad for work or for other purposes like education, visit to doctor, marketing and going to ST stand etc. Accused nos.1 and 2 were the students of Waghire college at Saswad which is located on the Pune-Saswad road and

the ST bus stand is at a short distance from the said college towards Pune side. Aptech computer class was located opposite the ST stand at the relevant time and within the municipal limits.

5A. The learned counsel for the accused no.1 submitted that the order of conviction and sentence passed by the learned Addl. Sessions Judge in the instant case is not supported by any cogent and reliable evidence. The prosecution has failed to prove its case beyond reasonable doubt, regarding the culpability of the accused no.1 in causing the murder of the victim viz. Rishikesh. The prosecution case is based entirely on the circumstantial evidence and the chain of circumstances has a number of missing links and, therefore, the prosecution story on the basis of such an evidence ought to have been rejected by the trial Court. The investigation was tardy, full of loopholes and strongly influenced by the public outcry in the form of processions and the media reporting etc. If the accused are from a tiny village Ambodi, it is surprising that on the 1st accused having been arrested on 8/2/2001, the other two accused were taken in custody only on 18/2/2001 and the evidence of the IO (PW 41) does not explain

as to how they zeroed on these other accused. The TI parade held on 15/3/2001 and conducted by the Tahsildar (PW 37) was full of procedural flaws thereby vitiating the identifications of the accused and the report of the TI parade was not available. The complainant (PW 38) being a well known doctor at Saswad, the investigation machinery was under tremendous pressure and innocent college and school boys were roped into as the accused. The recovery of the dead body of the victim and his belongings were sought to be proved by the witnesses who were either doctors or traders and it was unbelievable that these traders or telephone booth owners could identify accused no.1 after a gap of few years before the trial Court. As per the learned counsel the chain of circumstantial evidence did not remain unbroken so as to unerringly point out the involvement of accused no.1 alone or along with the accused and the prosecution failed to prove the charges as levelled at Exhibit 5. He placed reliance on the decision of the Apex Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra **[(1984) 4 SCC 116]**.

6. Before we start sifting the evidence, it is pertinent to note that ordinary men and women on

hearing shocking news or incidents unfold their memories if they have any connection with such incidents. The police diary indicates that Saswad and its neighbouring area was already under a shock on account of two-three other incidents of kidnapping of children and the missing of Rishikesh further added to the fear and shock of these people. Public protests and processions further make the memories linger for longer. Ambodi is a small village with less than 100 families and all the accused are from such a hamlet and from the farmers' families. The accused no.1, though a college student, had a two wheeler with him all the time and this vehicle certainly added to his identity in the college, at Saswad, with the shopkeepers and the telephone booths etc. and around the village life. The missing of a famous doctor's son had swept the surrounding areas of Saswad town and for four days it remained a mystery. The accused no.1 was taken in custody and the victim's dead body was recovered at his instance and from his agricultural land on 9/2/2001 at about 9 a.m. in the presence of a large number of people who had assembled at the spot as is clear from the photographs duly proved. The accused was in veil when the body was recovered at his instance. His

arrest and recovery of the dead body were shocking news which perhaps hit the headlines in the local press. No wonder then, that the men and women from Ambodi and Saswad recalled their memories of seeing all the accused together a few days before either on the M-80 vehicle, the telephone booths, grocery shops or tea stalls etc. In the restaurant he was a frequent visitor and the young tea server knew him but it is possible that he was also one of those stunned by the news of the arrest of accused no.1 and the recovery of the victim's dead body at his instance. Obviously this tea server recalled the visit of accused no.1 along with other accused on 4/2/2001 at about 7.45 p.m. and more so when he was paid extra money and asked to retain it for the next day. The statements of most of the witnesses examined before the trial Court have been recorded on or after 9/2/2001, except those who were panch witnesses for the recovery of the victim's cycle in the mid night on 8/2/2001. The extra judicial confessions made by accused no.2 and the juvenile accused are also after 9/2/2001. Though the accused were taken in veil for the TI parade on 15/3/2001, the report of the TI parade is not very significant for proving the case of the prosecution as most of

the concerned witnesses have identified the accused no.1 or accused no.2 before the trial Court. We have, therefore, to consider the prosecution case and the challenge to it on the backdrop of these circumstances and the human behaviour of ordinary men and women.

7. Dr.Eknath Dhondiba Male (PW 35), who was In-charge Medical Superintendent of the Rural Hospital at Saswad had performed autopsy on the dead body of Rishikesh on 9th February 2001 between 11-30 to 12-30 noon and was assisted by Dr.P.S.Khandkar and Dr. B.N.Turoriker, both Medical Officers attached to the said hospital. The post mortem was carried out in the agricultural land from where the body was exhumed near village Ambodi after it was identified by the complainant Dr.Mainkar (PW-38). As per the medical officer, the dead body was of a male aged about 13 years and around the neck the rounds of metal wire encircling the neck completely with a twisting knot tied anteriorly were noticed. Signs of decomposition as noted below were present on the dead body while the skin had turned blackish green on decomposition:

(a) presence of bullae, especially on upper limbs and lower limbs filled mainly with gas with red coloured fluid oozing through it.

(b) Degloving of the skin of hand, thigh, legs, palms and soles.

(c) Face had a bloated appearance, eyes were closed and process of putrefaction had started in the skin.

(d) Mouth was partially open through which upper four incisors could be seen which were completely overlapping the lower teeth. Fluid was oozing from the left ear.

The external injuries noticed were:

(a) Presence of contused abrasion of 1 cm. width due to ligature around the neck which was black in colour, grooved and completely surrounding the neck in horizontal manner.

(b) On skin dissection echymosis was present below the ligature mark in the subcutaneous tissues which

were black in colour and

(c) fracture of hyoid bone.

All these injuries were noted to be ante mortem.

. On internal examination no injuries were present on head and skull. Brain was found putrefied and the process of liquification had begun in the brain. Right and left lungs were both found in the process of putrefaction and liquification had started. Heart was found empty. The stomach was found empty and both the intestines were filled with gases and appeared bloated. As per the doctors' opinion the cause of death was "asphyxia due to strangulation". The P.M. notes recorded at Exhibit 111 were confirmed by the witness who also confirmed that no poison was detected in the viscera as per the report received from the Chemical Analyser and, therefore, he confirmed his earlier opinion that the death of Rishikesh was caused by strangulation. The witness stated that he had performed about 100 P.M. examinations and stated that the death of Rishikesh might have occurred more than two days and before seven days of the PM examination and he further

deposed that no opinion regarding the exact time of death could be given. In the cross-examination of this witness on behalf of the accused, his testimony in the examination-in-chief remained in tact. In his cross-examination he denied the suggestion that the deceased being the son of Dr.Mainkar, he had expressed wrong opinion as to the probable time of death of the deceased.

8. As per the depositions of Dr.Mainkar (PW 38) 4th February 2001 was a Sunday and when he left for Pune between 4-30 to 5 p.m. on that day Rishikesh was at home. The deceased had left for the computer class on his Hercules bicycle at 6 p.m. and did not return till 10 p.m. when Dr.Mainkar and his wife had returned home from Pune, his daughter-Ruta who was at home informed him that around 8 p.m. one boy by name Jagtap had informed her on telephone that Rishikesh was with him and would return on the next day. Dr.Mainkar and his daughter-Ruta saw the dead body of Rishikesh on 9th February 2001 at about 9-30 a.m. in the agricultural land of accused no.1.

. Atul Arjun Chavan (PW 26) was working at Aptech Computer Education at Saswad in the year 2001.

As per him there were about 81 students in the Institute in different batches and he had known Rishikesh Mainkar who had taken admission in the Institute on 2/11/1999. As per him Rishikesh was in the evening batch between 7 p.m. to 8-30 p.m. and the students were allowed to use the internet facility on Sundays between 11 a.m. to 5 p.m. He stated before the trial Court that on 4-2-2001 Rishikesh had met him at 6 p.m. in the Institute and it was a Sunday. Rishikesh had made enquiry with him about one Rohit Jagtap and he had informed the deceased that no one by this name had come to meet him. Thereafter Rishikesh left the Institute and immediately one boy came to the Institute enquiring about Rishikesh and he was told that Rishikesh had already left. This boy who had come to enquire about Rishikesh and met PW 26-Atul Chavan was none other than Dattatraya Tupe (PW 25). While in the witness box Dattatraya Tupe stated that on 4/2/2001 he met accused no.1 while returning from the ST stand at Saswad on a bicycle. Accused no.1 had called him and asked for a cup of tea from him. Therefore, both of them went to a nearby hotel, had tea and while they were coming out accused Dnyaneshwar told him to call Rishikesh from the Aptech class and accordingly he

had gone to Aptech class and met the teacher in the said Institute i.e PW 26. He was told by the teacher that Rishikesh had just left and, therefore, when he returned to the accused no.1 he saw a boy standing near him and told the accused no.1 that Rishikesh was not in the institute. The accused no.1 told him that the boy standing with him was Rishikesh who was wearing a T-shirt of chocolate yellowish colour with verticle strips and a full pant. Thereafter accused Dnyaneshwar and Rishikesh went towards Saswad on a two wheeler of Dnyaneshwar (M-80 with Registration No.MH-12/AK 1980). In his cross-examination he stated that he disclosed the said information to the police for the first time on 13/2/2001 when his statement was recorded and he was with accused Dnyaneshwar and Rishikesh for about five minutes on 4/2/2001 after he returned from Aptech institute. His statement was also recorded before the Magistrate under Section 164 of Cr.P.C. The evidence of these two witnesses shows that at about 6 p.m. Rishikesh visited the Aptech institute, enquired from his teacher PW 26 whether a boy called Rohit Jagtap had come for him and he left the institute immediately thereafter. He was seen with accused Dnyaneshwar for about five minutes by PW 25 and thereafter both of

them left on the vehicle of accused no.1 towards Saswad.

9. PW 22-Vimal Borkar, a resident of Ambodi and an agriculturist by occupation stated before the trial Court that she knew both the accused and that accused no.1 had a two wheeler (M-80). She had seen all the three accused on the vehicle of accused no.1 and he was driving the said vehicle with accused nos.2 and 3 as pillion riders at about 7 p.m. on 4/2/2001. They were going by Waghapur-Saswad road towards Saswad. Police had recorded her statement on 24/2/2001 and before the said disclosure to the police she had also informed about the incident to some other people including Smt.Shaila Nanasaheb Bhandwalkar, who is the mother of accused no.2. She refuted the suggestion that there were no street lights in the village when she had seen all the three accused at 7 p.m. on 4/2/2001. She admitted that there were no street lights near her house and accused no.1 was her distant relation but the relationship was not cordial at the relevant time. She denied the suggestion that she was deposing against the accused no.1 as she was not having cordial relationship with his family. There is no

reason to discard this testimony of a relation only because she was not on cordial relationship with the family of the accused. Her testimony has been supported by the evidence of PW 23-Rahul Borkar and PW 21-Chandrakant Yadav.

. Rahul Borkar (PW 23), a resident of Ambodi and a student at the relevant time, stated before the Court that all the three accused were the residents of his village and accused no.1 owned a two wheeler (M-80) with its Registration No.MH-12 / AK-1980 of red colour. On Sunday, 4th February 2001 it was about 7-30 p.m. when he and his friends were gossiping at the katta near Yeshwantrao temple when he saw all the three accused on the two wheeler of accused no.1 and the accused no.1 was driving the same. They were proceeding to Saswad. This portion of the statement was not in any way shaken up in his cross-examination on behalf of the accused nos.1 and 2. Chandrakant Yadav (PW 21) was working in a tea stall of his maternal uncle Shri Tanaji Nivrutti Kamthe. He knew accused no.1 who was the resident of village Ambodi. On 4/2/2001 around 7.45 p.m. the accused no.1 visited his hotel along with two other persons who were of his age and had come on his

vehicle. He had ordered tea for all the three and the witness served him tea. The bill had come to Rs.6/- but accused no.1 gave him an amount of Rs.21-50. When the witness returned the remaining amount, the accused no.1 asked him to keep the balance so as to be adjusted in the next visit. Thereafter they had left on their M-80 and at that time accused no.1 Dnyaneshwar had a blue coloured bag in his hand. Amongst the two other persons accompanying accused no.1 to the hotel on 4/2/2001, the witness identified accused no.2 before the Court while in the witness box and also in the TI parade held on 15/3/2001. In his cross-examination he admitted that there used to be many customers around 7-45 p.m. in his hotel and, therefore, he was required to concentrate on his shop. He denied the suggestion that he was making false statements regarding the visit of the accused to his hotel on 4/2/2001. In our considered view this was a natural witness and he knew the accused no.1 even before he had visited the hotel on 4/2/2001. He also knew that he was a resident of Ambodi and he could remember about the visit of accused to his stall on 4/2/2001 more particularly because of the incident of over payment. While accepting the testimony of this

witness, we have discarded his identification of accused no.2 in the TI parade held on 15/3/2001. However, the witness has identified the same accused in the Court. This identification in the Court is reliable.

. This chain of events from 6 p.m. to 7.45 p.m. on 4/2/2001 goes to show that the deceased was seen in the company of the accused around 6.30 p.m. by PW 25 and all the three accused were seen returning at about 7 p.m. by PW 22-Vimal Borkar coming from Waghapur-Saswad road and proceeding towards Saswad. Village Waghapur is beyond village Ambodi and if one starts from Waghapur, he goes to Ambodi and then goes to Saswad. They were also seen by PW 23-Rahul Borkar at about 7-30 p.m. and had tea in the hotel where Chandrakant Yadav-PW 21 was working at about 7-45 p.m. The evidence of PW 1-Dr. Dilip Wagholikar has proved the recovery of the Hercules company's cycle at the instance of accused no.1 from the well located on Saswad-Pune road and at about 80 ft. inside the main road near Tara Dutt Housing Society in the midnight on 8/2/2001. The memorandum panchanama at Exhibit 30 regarding the recovery of the cycle has been duly proved by this witness and from the

memorandum panchanama (Exhibit 29) it is seen that the said cycle was lifted from Aptech computer institute on 4/2/2001 and was thrown in the said well by the accused. The cycle belonged to the deceased and it was identified as Article No.28 before the Court by the complainant-PW 38 as well as Dr.Wagholikar (PW 1). The conclusions of the trial Court that Rishikesh was picked up from Aptech computer institute by the accused no.1, he was taken by the accused no.1 on his M-80 vehicle straight to the agricultural land of accused no.1, he was done to death, buried in the pit by the accused and the pit of the size of 7 ft. length, 2 and 1/2 ft. width and 4 and 1/2 ft. deep was already kept ready by the accused, thereafter they left the place of incident on M-80, came back to Saswad, had tea and picked up the cycle from Aptech computer institute and dropped it in the well on Pune-Saswad road after 8 p.m. on 4/2/2001 and accused no.1 made a telephone call to the residence of Dr.Mainkar at about 8-00 p.m. when he informed Ruta that the deceased was with him and would return on the next day morning, are required to be upheld.

10. The telephone call made on 4/2/2001 which was

taken by Dr.Mainkar's daugther has been proved in the evidence of PW 14 - Kishor Jagtap and the print out at Exhibit 74. He had two telephone numbers i.e. 22064 and 23918. The call lasted for 32 seconds and the bill amount was Rs.1.26. The medical evidence, therefore, corroborates that the deceased was done to death between 6.30 to 7 p.m. on 4/2/2001. The last seen theory coupled with the accused seen together after committing the crime, recovery of the bicycle on 8/2/2001 at the instance of accused no.1 and the recovery of the dead body on 9/2/2001 at the instance of accused no.1 was sufficient circumstantial evidence to prove the culpability of the accused in killing Rishikesh on 4/2/2001. However, the prosecution did not leave the case there and proceeded further to prove other circumstances viz. recovery of the belongings of Rishikesh, preparation for digging the pit, purchase of salt and metallic wire and the subsequent demands of ransom made by the accused no.1 over telephone to Dr.Mainkar.

11. On 11/2/2001 the accused no.1 while in police custody made the disclosure regarding the wrist watch of the deceased and offered to show the same. Accordingly the memorandum was drawn at Exhibit 37

and the accused was taken in a jeep along with panch witness Balasaheb Bhintade (PW 3). The accused took the police party and the witness to his house, went inside the room and took out one wrist watch which was kept on the TV behind the tape recorder. The wrist watch was of Escort make with black dial and black belt. Seizure panchanama at Exhibit 38 was drawn. The witness identified the said watch before the Court as Article no.18. The description of the watch as appearing in Exhibit 38 tallied with the description given by the complainant (PW-38) and it was a wrist watch worn by the deceased on 4/2/2001. The accused no.1 then led the police party for the recovery of M-80 and wallet which was hidden by him. Memorandum was drawn at Exhibit 39 during 2.05 hrs. to 2.20 hrs. The accused led the jeep on Jejuri road and after a distance of about 7 Kms. he stopped the jeep near Khalad village. He got down from the jeep along with the panchas and the police to show his vehicle M-80 kept near the culvert facing towards village Khalad. The vehicle in red colour bearing Registration No.MH-12/AK-1980 was recovered under the recovery panchanama at Exhibit 40. Then the accused led the jeep towards village Khalad and near the temple of Ekalpur village on Western side, he halted

the jeep near the house of Sudhakar Zurange (PW 27). He entered the house from the door having one plank and went to the kitchen. On the Southern corner some photographs of deities were hanging at a distance of about 5 ft. height and he took out one leather wallet from the third photograph. It was a wallet of black colour with brass letters (Article 19). It was seized under recovery panchanama at Exhibit 40. At about 5 p.m. on the same day accused led the police party along with witness PW 3 and Pradip Solanki for the recovery of the chappals removed from the dead body of Rishikesh. Memorandum statement at Exhibit 41 was drawn between 5-10 to 5-25 p.m. He led the police party on Jejuri road and at Wambori road he asked the driver to go on Waghapur Chouphala road. He stopped the jeep at about 1 Km. near one well. The panchas and the accused along with the police party got down from the jeep, the accused peeped in the well and showed the chappal pair which was floating on the water. The police constable went down in the well by means of ladder and pipe and took out the chappals which were recovered under recovery panchanama at Exhibit 42. These chappals (article no.20) were identified by PW 3 as well as PW 38. For the recovery of wrist watch, M-80 vehicle, wallet and

the chappals the investigation team had taken the photographer who had snapped the photographs at Article Nos.A-14 to A-19. The photographer Shri Arun Bahulikar (PW 39) has proved the photographs including those when the exhumed dead body was recovered on 9/2/2001. In the evidence of Bapu Sambhaji Kadmane the prosecution has proved hand writing samples of accused no.1 taken on 21/2/2001 at Exhibits 67/1 to 67/6 vide panchanama at Exhibit 68. The recovery of note book (Exhibit 44-A) from the house of accused no.1 has been proved in the evidence of Jamir Bagwan (PW 4). The said recovery was made on 19/2/2001. The note book contained about 35 pages. On some pages the following words were scribbled and it was proved to be the handwriting of accused no.1 by the evidence of handwriting expert F.I.Shaikh:

> "Hello, kon doctor saheb. Tumcha mulga aamchya tabyat aahe. Jar mulga pahije aasel tar 5 lakh."

When the notebook was recovered from the house of the accused no.1, his mother Malan Borkar was present in the house.

12. Now coming to the preparation for digging the pit and dispose off the dead body the plan of the accused is unfolded initially in the testimony of Shashikant Sadashiv Golande (PW 13). He stated that he was running a grocery shop in the market area of Saswad and in the name and style of "Golande and Sons". The police had visited his shop on 19/2/2001 at about 8 p.m. and enquired about the sale of crystal salt. He had informed the police that on 4/2/2001 one person had come to his shop on M-80 motor cycle and purchased 5 Kgs. of crystal salt for Rs.15/- and he did not purchase any other articles. He identified accused no.1 as the person who had come on the M-80 motor cycle and purchased 5 Kgs. of crystal salt on 4/2/2001. He had also identified the accused no.1 in the TI parade in the Tahsil office at Saswad on 15/3/2001 from amongst seven persons by pointing him in a row. His cross-examination did not impeach the testimony so far as it related to the accused no.1 purchasing the crystal salt on 4/2/2001. Then we go to the testimony of Dilip Katkar (PW 20) who has a grocery shop at Saswad. He stated before the trial Court that on 2/2/2001 one boy aged about 18 years visited his shop around 4-30 p.m. and

purchased 5 Kgs. of ground salt. He remembered the incident because in normal course nobody purchased such big quantity of salt and the purchaser gave him one Rs.100/- note and Rs.85/- were returned to him. The purchaser was given 5 packets of 1 Kg. each and he had come on M-80 red coloured moped. The witness identified accused no.1 before the Court by pointing out as the person who purchased the salt on 2/2/2001 at about 12-30 p.m. This testimony could not be disturbed in any manner in the cross-examination. He also admitted that he was not called upon to identify the accused in the TI parade by the police. The testimony of PW-13 and PW-20 has also been further supported by the panch witness Shri Maruti Pingle (PW 8).

13. Popat Borkar (PW 24) stated before the trial Court that he knew accused no.2 and while he was at his house in Ambodi on 30/1/2001 accused no.1 had gone to his house and collected a tikav (a digging implement) at about 10 a.m. He identified the tikav (article no.25) before the Court as being the same which was collected by accused no.1. He also stated that the said article was recovered from his house by the police and at the instance of accused no.1. In

the cross-examination he admitted that the arrest of accused no.1 came to his knowledge from the newspapers and he did not go to the police station on his own till his statement was recorded by the police. He also admitted that Dr.Mainkar was a well known medical practitioner in Saswad area and many people visited him for medical treatment from his village. He denied the suggestion that on account of the pressure from Dr.Mainkar he was making false statements before the trial Court. In the evidence of Shri Balu Jagtap (PW 9), the recovery of spade (Article 21) from the building named "Vishnu Chaya 1969" has been proved. This is the house of Nilesh Borkar - the juvenile accused.

14. We then come to the events after Rishikesh was done to death on 4/2/2001 and more particularly the demand of ransom made by accused no.1 on telephone with Dr.Mainkar (PW 38). The first call Dr.Mainkar received was at 8-40 p.m. on 5/2/2001. The caller did not disclose his name but talked to him in Hindi "Tumhara bachcha hamare pas hai. Internet khel raha hai. Hamne use kuch nahi kiya.". When the doctor asked the caller to return his son, the caller asked him to keep ready an amount of Rs.5 lakhs. When the

doctor replied that he had no money, the caller told him that the son would be retained in custody and the caller would telephone him again on the next day morning. When the doctor told him not to take such a long time, the caller asked him to keep the money ready by the next day morning and he would phone the doctor but at the same time advised him not to inform the police about it and if so informed, he would face the consequences saying "Amchyashi gath aahe". The doctor visited the police station at 6 a.m. on 6/2/2001 and recorded the complaint at Exhibit 123 which came to be treated as the FIR. This telephone call has been proved by the evidence of Narayan Sakharam Shinde (PW 12) read with Exhibit 70, the print out. The witness was the owner of Yashadeep hotel near Waghire college bus stop. The call had lasted for 32 seconds. The witness stated while in the witness box that the phone call was made by the college student named Borkar who used to frequently visit the booth and he identified the accused no.1 before the Court as the same person who had made the call. He also stated that he had informed the police that the caller was between the age group of 21 to 22 years with fair complexion having sharp nose. In the cross-examination he stated that his hotel was

located on Pune-Saswad road and on an average about 100 phone calls used to be made in a day from his STD booth. As per him the accused no.1 was a frequent visitor to the booth and, therefore, he knew him. He used to move about on his M-80 red colour moped. The person making the call went inside the cabin, made the call and thereafter came to the counter, paid the bill and went away. He admitted that his statement was recorded on 19/2/2001 and he did not specifically state that on 5/2/2001 one call was made to Dr.Mainkar. He also stated that TI parade was held on 15/3/2001 in the Tahsil office at Saswad between 2 to 2-30 p.m. He denied the suggestion that prior to the TI parade the police had shown him the photograph of the accused and they had asked him to identify the accused. The improvements or contradictions are negligible on the face of the telephone print out at Exhibit 70 which clearly shows that from telephone no.23933 the call was made to telephone no.22553 at about 8-32 p.m. and the telephone bill came to Rs.1.26. The witness was emphatic that the accused no.1 was known to him and, therefore, the TI parade was inconsequential

. On 6th February 2001 Dr.Mainkar (PW 38)

received another call at about 6-45 p.m. and the caller disclosed his name for the first time as Salimbhai and asked the doctor whether his work was done (hamara kam kiya kya). The doctor told him that the job was done and that he should hand over the telephone to his son. The caller informed him that the son was playing internet and after one hour he would be brought on phone. The caller again told the doctor not to approach the police and assured that he would tell about the place to meet on the next day. The evidence of Dattatraya Manohar Jagtap (PW 18) proved that from his STD booth bearing telephone no.53071 a call was made to telephone no.22553 at about 6-26 p.m. by a boy aged between 20 to 21 years with thin built and was wearing a T-shirt of faint yellowish colour with a grey colour pant. He identified the accused no.1 in the Court during his depositions. He also stated that he was called for TI parade held on 15/3/2001 in the Tahsil office at Saswad and he had identified the accused no.1, from amongst 6 to 7 persons standing there in one line. He identified the grey colour pant (article no.10) and yellowish shirt (article no.3) before the Court as being the same clothes worn by accused no.1 on 6/2/2001 when he came to the STD booth. This call is

further proved by Exhibit 79 and the depositions of Shri P.D.Bhosale (PW 33), Sub Divisional Engineer, BSNL, Saswad who stated before the trial Court that at the instance of the I.O. he had given necessary command to keep Dr. Mainkar's telephone (telephone no.22553) under observations from 5/2/2001 and the said telephone was under surveillance upto 8th February 2001. He had collected the information of all the in-coming calls made on the telephone of Dr.Mainkar and supplied the same to the Police Sub Inspector of Saswad police station vide letter dated 16th March 2001 (Exh.106) and along with the said letter statement of calls made on the telephone of Dr.Mainkar was supplied.

15. On 7th February 2001 Dr.Mainkar received the first call at 7.15 a.m., the caller disclosed his name as Salimbhai and asked whether his work was done and when the doctor asked him as to why he did not come yesterday, he stated to have gone out. This incoming telephone call has been proved by the evidence of Pandurang Bhosle (PW 33) and Dilip Yeole (PW 17). It is pertinent to note that the accused no.1 had promised Dr.Mainkar that his man would meet the doctor and collect the ransom on 6/2/2001 and

from the evidence of Bapu Bhapkar (PW 30) and Pramod Tekawade (PW 29) it is clear that the accused no.1 had approached them to look for a man unknown to him so as to collect the ransom and these witnesses, who were his classmaters or collegemates, had expressed their inability to find such a person. On 7/2/2001 also it appear that the accused no.1 made his efforts to look for a suitable man to go and collect the money from Dr.Mainkar but the accused was unsuccessful in doing so and, therefore, he called the doctor second time on 7/2/2001 at about 7 p.m. from the STD booth no.6993768 at Hadapsar as has been proved by the testimony of P.I. Kshirsagar (PW 41) read with the testimony of Pandurang Bhosle (PW 33). During the conversation the accused asked the doctor angrily as to why he informed the police about his demand of Rs.5 lakhs and whether the doctor's telephone was tapped. When he was assured that the doctor did not go out of his house, the accused informed the doctor that his man would meet him on the next day at 12 noon and would disclose his identity as coming from Salimbhai. The accused also informed that about five minutes to this man's visit he would call the doctor again. The accused continued his search for a suitable man on 8/2/2001

but was unsuccessful till 12 noon and, therefore, he telephoned the doctor at about 12.15 hrs. on that day saying that the man would reach at 1 p.m. (Tel.No.6997364 - STD booth of PW 16). The second call was made between 1.45 p.m. to 2 p.m. and the third call at 3.30 p.m. informing the doctor that man would meet him at 4 p.m. and the accused was contacting from Hadapsar. The accused also informed the doctor that on Pune-Jejuri road after village Belsar there is a small temple of white colour on which slogan "Chalo Nashik" was written and the man would be waiting at that spot where the doctor was told to keep the money bag. The doctor was further told that after depositing the money bag at the spot he should return home and then his son would be released and reach the house in the evening. However, the mission failed and the accused No.1 called Dr.Mainkar between 4.30 to 5.00 p.m. for the fourth time and informed him that the man would not come to receive the money. This telephone call is proved by Kaluram (PW 19) and Sudhakar (PW 27). The driver PW 32 deposed before the Court as to how the labourer hired to work on the sugar cane juice centre was sent back by the accused no.1 by snatching Rs.50/- from his pocket at about 4.30 p.m. on

8/2/2001. All these telephone calls have been proved by the prosecution not only through the testimony of the I.O. and the BSNL Engineer but also from the testimony of the respective booth owners i.e. Asha Gandhi (PW 16), Walmik Jadhav (PW 15), Kaluram Zurange (PW 19) and Sudhakar Zurange (PW 27). His last call to the doctor at about 4.30 to 5 p.m. proved to be the last straw on his search for a suitable man to collect the money. That call proved to be disastrous for the accused and after that he came to be arrested within an hour or so. But on 8/2/2001 the accused no.1 moved from Saswad to Hadapsar in search of a suitable man and he used his friends' company who were calling upon another friend admitted in the hospital at Pune. Bapu Bhapkar (PW 30) and Vijay Kamthe (PW 31) were the classmates of the accused no.1 and on 8th February 2001 they met him at Waghire college at about 9 a.m. and proceeded towards Hadapsar to meet a common friend Rajesh who was hospitalised. On the way back the accused no.1 started making enquiries with two-three rickshaw-wallas about their willingness to drive down to Saswad and a rickshaw was hired. The accused no.1 told his friends that he wanted to pick up a person from a nearby zopadpatti to work at the sugarcane

juice centre. Accused no.1 went to the zopadpatti and hired one man and handed over Rs.50/- to him as the day's salary. This man was taken in the rickshaw driven by Ramesh Parte (PW 32) between 11 to 11.30, and hire charges of Rs.200/- were paid to the rickshaw driver. The hired person after reaching Saswad refused to do the work which was told by the accused no.1 i.e. to go and collect the bag from the designated place. The testimony of these four witnesses clearly proved that the accused no.1 had hired a person from Hadapsar on 8/2/2001 under the pretext of assigning him work at the sugarcane juice centre but after reaching Saswad in a rickshaw driven by PW 32 the accused told the hired man to go and collect a bag / suitcase from the designated place near the temple and he refused to do so. The accused no.1 was angry and, therefore, the hired man was sent back, by snatching Rs.50/- from his pocket and paid to him earlier at Hadapsar.

16. The evidence of Bapu Bhapkar (PW 30) also went to show that accused no.1 had sold his gold chain on 7/2/2001 at about 12 noon near the bus stand at Saswad. They went to the goldsmith i.e. Rajendra jewellers and the jeweller's son was the classmate of

the accused as well as the witness. On reaching the said shop accused no.1 disclosed to him that he had already gone there and the shop owner had refused to buy the piece of gold chain. Therefore, the accused no.1 asked the witness to go to the shop alone and get the gold chain sold. Accordingly Bapu Bhapkar went to the shop, contacted the son of Rajendra Jewellers who was his classmate and on weighing the gold chain he informed its value at Rs.510/-. Bapu collected the gold chain and returned to accused Dnyaneshwar and told him that he would get only Rs.510/- from its sale. Accused no.1 agreed for the said money and, therefore, he came back to the shop, handed over the gold chain to his classmate i.e. the son of Rajendra Jewellers and got Rs.520/- from him. The entire amount was handed to accused no.1 who was waiting on his M-80 vehicle and the accused no.1 dropped him at the ST bus stand. This evidence shows that the accused no.1 was running short of money and was preparing to hire a person who would collect the cash bag to be deposited by Dr.Mainkar.

17. Thus the chain of events from 5/2/2001 to 8/2/2001 till the arrest of accused no.1, in respect of the demand of ransom from Dr.Mainkar by giving

telephone calls from different locations has been proved by the prosecution and the testimony of Police Inspector (PW 41) and Pandurang Bhosle (PW 33) has sufficiently corroborated these telephone calls. The telephone conversation or the demands made by the accused no.1 and as stated by Dr.Mainkar while in the witness box could not be in any way shaken in his short cross-examination. It is also reflected from the evidence of the Police Inspector (PW 41) that as and when Dr.Mainkar received these calls from 6/2/2001 onwards the calls were being monitored on a parallel line by the two police constables deputed at the residence of Dr.Mainkar and these constables were also hearing the conversation and passing on the information to the P.I. simultaneously. This testimony of the P.I. (PW 41) also went unchallenged in his cross-examination. Thus the prosecution duly proved the demand of extortion i.e. an amount of Rs.5 lakhs made by accused no.1 to Dr.Mainkar (PW 38), the father of the victim and that too after the victim was done to death on 4/2/2001 itself.

18. Having considered the evidence proving beyond doubt the culpability of accused no.1 in abducting the victim, killing and burying him and thereafter

demanding the ransom from his father, we have to now examine the involvement of accused no.2 in the said crimes or in one of them either independently or along with the accused no.1 with the aid of Section 34 of IPC. Section 34 of IPC states that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The scope of Section 34 has been unambiguously stated in the case of Ramesh Singh @ Photti v. State of A.P. **[JT 2004 (4) SC 62]** in the following words:

> "...As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held to be guilty. By introducing section 34 in the Penal Code the Legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of

such intention. Thus, if the act is the result of a common intention then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration. Section 34 IPC embodies the principles of joint liability in doing the criminal act based on a common intention. Common intention essentially being a state of mind it is very difficult to procure direct evidence to prove such intention. Therefore, in most cases it has to be inferred from the act like, the conduct of the accused or other relevant circumstances of the case. The inference can be gathered by the manner in which the accused arrived at the scene, mounted the attack, determination and concert with which the attack was made, from the nature of injury caused by one or some of them. The contributory acts of the persons who are not responsible for the injury can further be inferred from the subsequent conduct after the attack. In this regard even an illegal omission on the part of such accused can indicate the sharing of common

intention. In other words, the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had the common intention to commit an offence of which they could be convicted."

19. The accused no.2 was seen to be along with accused no.1 and the juvenile accused from 7 p.m. to 8 p.m. on 4/2/2001 either while on the M-80 of the accused no.1 or in the hotel while taking tea as is proved from the testimony of Chandrakant Yadav (PW 21), Vimal Borkar (PW 22) and Rahul Borkar (PW 23). These are all natural witnesses and some of them are the distant relations of the accused and residents of the same village. The testimony of these witnesses does not suffer from any doubt and all of them knew the accused. They had no reasons to cook up a story, stand before the Court or the police and depose against the accused in the facts of this case. The involvement of accused no.2 in the chain of crimes which are being dealt with by this judgment has been further proved by the extra judicial confessions made by accused no.2 to Gokul Khomane (PW 28) who is his maternal cousin brother and the confessions made by accused no.3 (juvenile accused) to Rahul Borkar (PW

23) who is a relation of accused no.1. The law on the reliability of extra judicial confessions as evidence is well settled. In the case of Kishore Chand vs. State of H.P. **[AIR 1990 SC 2140]** it is observed as under:

> "An unambiguous extra judicial confession possesses a high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of its falsity. But in the process of the proof of the alleged confession the Court has to be satisfied that it is a voluntary one and does not appear to be the result of inducement, threat or promise envisaged under Sec. 24 of the Evidence Act or was brought about in suspicious circumstances to circumvent Ss. 25 and 26 of the Evidence Act. Therefore, the Court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose the

> Court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally the actual words used by the accused. Extra-judicial confession if found to be voluntary can be relied upon by the Court along with other evidence on record. Therefore, even the extra-judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused."

In the case of State of Rajasthan vs. Rajaram **[(2003) 8 SCC 180]** the evidentiary value of extra judicial confession was stated in the following words:

> "The value of the evidence as to the confession depends upon the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption

that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it."

20. In the instant case Gokul Khomane (PW 28) stated before the trial Court while in the witness box that he knew accused no.1 Dnyaneshwar as well as accused no.2 who was his cousin brother from the maternal side and also Nilesh Borkar (juvenile

accused) as he was the resident of his village. On 11th February 2001 while he was working at the construction site of Jagtap Indulkar at Trishul Society in Saswad accused-Amit went to him at about 10 a.m. and looking at him this witness asked the accused "Bapu tu lai sukla aahe" (Bapu you have gone very thin). Thereupon the accused disclosed to the witness that he and Nilesh Borkar had dug a pit at chavra, thereafter accused-Dnyaneshwar had brought Rishikesh there on his vehicle, accused no.1 with the help of wire suffocated Rishikesh by pressing his neck with his hand and killed him. After Rishikesh was killed, he himself, accused Dnyaneshwar and Nilesh Borkar buried Rishikesh in the pit. In the cross-examination he stated that Trishul society was in front of Waghire college and after reading the newspaper he had come to know about kidnapping and murder of Dr.Mainkar' son. He was also aware that it was a talk of the town and even people of Saswad had taken out a procession. He also disclosed that he had come to know about the arrest of accused no.1 on the same day he was arrested in connection with the murder of Rishikesh. On a specific question in his cross-examination he disclosed that the incident of Amit meeting him on 11/2/2001 and disclosing about

the murder of Rishikesh was disclosed by him to the parents (of the accused) as well as his (witness') family members. He also admitted that his statement was recorded by the Magistrate after the police recorded his statement on 19/2/2001. He denied that he was deposing at the instance of Dr.Mainkar or the police. He further admitted in the cross-examination that he did not disclose his relationship with the accused-Amit while his statement was recorded by the police. This so called improvement has no bearing in doubting the testimony of this witness because in the examination-in-chief itself he reiterated that Amit was his cousin brother from the maternal side. This witness is thus a natural witness who is unbiased, uninfluenced, not under duress and not even remotely inimical to the accused. It is a fact that though the accused no.1 was taken in custody on 8/2/2001, the accused no.2 was not arrested on 11/2/2001 and the workplace of the witness on that day was just in front of the college where the accused no.2 was a student. It has come on record that the college classes used to start at about 8.30 a.m. and, therefore, it was natural that around 10 a.m. the accused no.2 saw his cousin in front of the college building on the construction site and was in his

company. The next witness on extra judicial confession is Rahul Borkar (PW 23), a resident of Ambodi village. He stated before the trial Court that within two to four days of his seeing the accused at about 7.30 p.m. on 4/2/2001 on the motorbike of accused no.1, he had read in the newspaper that accused no.1 was arrested in connection with the case of ransom. He had seen Nilesh Borkar sitting at the square of village Ambodi and he made enquiry from him as to whether he had gone to village Vir (this is the village where the land of the accused no.1 is located and wherefrom the dead body of Rishikesh was recovered). Nilesh had answered him in the affirmative and, therefore, he asked him as to why he had gone there. On this question Nilesh disclosed to him that accused no.1 Dnyaneshwar had taken him to dig a pit. In the cross-examination he admitted that he did not make enquiry from Nilesh as to why the pit was dug. He also admitted that it was a common practice in the village to help each other to dig a pit in the field. He admitted that his statement was recorded by the police on 24/2/2001 for the first time and that there are about 80 to 100 houses in the village. The police had gone to his house to record his statement

only once though they might have visited the village 7-8 times. He himself did not approach the police to disclose the incident and he also did not disclose about it to any of his family members. He also stated that he had no strained relations with accused Dnyaneshwar who was a distant relation. The suggestion of false evidence was stoutly denied by the witness. The confession by the juvenile accused made to Rahul Borkar (PW 23) relates only to the digging of pit and if read with the testimony of Gokul Khomane (PW 28) it is clear that all the accused had dug the pit in advance, accused no.1 had brought Rishikesh on his M-80 at about 6.30 p.m. and killed him by pressing his neck and tightening it with the help of wire. Thereafter all the accused had buried his dead body in the pit which was ready and left the place on the vehicle of accused no.1. It was not a pit dug in the normal course of agricultural operations. The pit was 7' in length, 2 1/2' in width and 4 1/2' in depth. The trial Court has rightly accepted these extra judicial confessions as reliable and free from the ambit of Section 24 of the Evidence Act. In the depositions of Pramod Tekawade (PW 29) the confessions of accused no.1 had clearly come out and to the effect that three days

back he had murdered one boy with the help of clutch wire and that he had destroyed all the evidence but the accused no.1 did not disclose the identity of the victim but stated that he was a rich man's son and he was creating obstacles in his business. In his cross-examination he stated about the disclosures made by accused no.1 were not told to his family members and the disclosure was made by accused no.1 near Odha (rivulet). He also admitted that though the disclosure made was a crime he did not go to the police to disclose the same to them.

21. The learned counsel for the accused no.2 vehemently submitted before us that the evidence against the said accused as coming through the extra judicial confessions was not reliable and more so when there was fairly big gap between the arrest of accused no.1 and accused no.2. We do not agree with the these submissions and as noted earlier the evidence on extra judicial confessions is reliable and free from any influence. The defence failed to bring on record that Gokul Khomane (PW 28) or Pramod Tekawade (PW 29) were on inimical terms with accused no.2 or any of the accused. This was the evidence free from inducement or threat by the police or by

anyone else. These witnesses had no score to settle against either of the accused. Their knowing Dr.Mainkar or the incidence of disappearance of his son which had become a talk of the town and people had taken out a big procession has no bearing on the veracity of their evidence regarding extrajudicial confessions as stated while in the witness box and which remained unchallenged in the cross-examination. The prosecution thus proved the culpability of accused no.2 in sharing common intentions with accused no.1 in causing the murder of Rishikesh. The prosecution also proved the involvement of accused no.2 in digging the pit along with the other accused and also burying the dead body of Rishikesh. None of the witnesses examined by the prosecution could be labled as got-up witnesses or the witnesses who had cooked up stories for showing sympathy for Dr.Mainkar. The defence failed to bring on record any major contradictions in the statements made before the trial Court while in the witness box as compared to the statements recorded by the police or the learned Magistrate under Section 164 of Cr.P.C. The evidence of these witnesses was uninfluenced, unbiased, natural, doubtless and, therefore, reliable. The trial Court was right in relying upon

the evidence of all these witnesses and thus the prosecution proved beyond reasonable doubts that the accused no.2 was guilty of an offence punishable under Section 302 read with Section 34, an offence punishable under Section 201 read with Section 34 of IPC, as he shared common intentions with the accused no.1 in the murder of Rishikesh.

22. The learned counsel for the accused no.1 referred to the depositions of panch witness Balu Jagtap (PW 9) and the memorandum statement made by accused no.2 at Exhibit 59 which has been proved before the trial Court and submitted that as per the prosecution case, the victim was killed by all the three accused and thereafter all of them went on the vehicle of accused no.1 to Saswad, had a cup of tea at about 7.15 p.m., went to the Aptech Computer Centre where the bicycle of the victim was parked, picked up the said bicycle and threw in the well on 4/2/2001 from where it was recovered on 8/2/2001. However, this statement of accused no.2 being inculpatory, cannot be accepted as evidence so as to hold the culpability of accused no.2 and the juvenile accused along with accused no.1 to kill Rishikesh by throttling his neck. Beyond this memorandum at

Exhibit 59, there is no case of the prosecution that the deceased was killed by all the accused or by accused no.2 or accused no.3 along with accused no.1. Under these circumstances, the contentions of the learned counsel for accused no.1 cannot be accepted that the prosecution itself doubted as to whether Rishikesh was killed by accused no.1 alone or by all the three accused by throttling on 4/2/2001.

23. In the charge framed at Exhibit 5, none of the accused were charged of an offence punishable under Section 364 of IPC, though the accused were charged of an offence punishable under Section 364A of IPC simplicitor or Section 364A read with Section 34 of IPC. The trial Court rightly held that such charge was not proved against any of the accused as there was no evidence of kidnapping for ransom in the instant case. The demand of ransom made by the accused from 5/2/2001 onwards from Dr.Mainkar was after Rishikesh was done to death on 4/2/2001. In fact in this case it was a murder for ransom and not a murder preceded by the demand of ransom, an offence unknown to the Indian Penal Code. On the basis of the evidence of PW-25 and PW-26 read with the evidence of PW-38 the trial Court has held that

Rishikesh was abducted/kidnapped from Aptech Computer Institute on 4/2/2001 at about 6 p.m. by accused no.1 and thereafter he was murdered by the said accused and, therefore, he has been rightly convicted for an offence punishable under Section 364 of IPC, though a charge for the same was not framed. In any case it is a lesser offence than the offence punishable under Section 364A. The deceased was kidnapped/abducted by the accused no.1 to cause his murder on 4/2/2001.

24. The accused no.2 has filed Criminal Application No.4389 of 2005 in his Criminal Appeal No.38 of 2005 and prayed for quashing and setting aside the order of conviction and sentence and to forward the applicant to the Board which shall pass orders against him in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the Juvenile Justice Act, 2000"). In fact from the record it is clear that such an application at Exhibit 35 was taken out by the accused before the trial Court contending that on the day he was arrested, he was less than 18 years of age and, therefore, a juvenile within the meaning of Section

2(k) and that his trial was required to be separated. This application moved on 23/1/2003 came to be rejected on the same day. In support of the said application the applicant had purportedly submitted a photostat copy of the school leaving certificate issued by Purandar High School at Saswad on 24/6/1999 and as per the said certificate accused no.2 was born on 6/7/1983 and was admitted to the said school on 17/7/1996. The date of incident is 4/2/2001 and he was arrested on 19/2/2001. Thus the accused was less than 18 years of age on the date of the incident as well as on the date of his arrest in case the certificate was duly proved. The trial Court did not call upon the parties to lead evidence to prove the date of birth or the school leaving certificate submitted by the applicant. The trial Court held that the Juvenile Justice Act was brought into effect from 1/4/2001 and, therefore, it was applicable only in the cases where the offence had taken place after the said date. As in the instant case the offence had taken place on 4/2/2001 the provisions of the amended Act were not applicable and in fact the case of the applicant was governed under the provisions of the old Act under which a male child below the age of 16 years could be held to be a juvenile offender and

the applicant being more than 16 years of age on 4/2/2001 he was not entitled to be treated as a juvenile, noted the learned Addl. Sessions Judge, in his order dated 23/1/2003.

25. The learned counsel for the applicant submitted that the order passed by the trial Court on 23/1/2003 is illegal and insisted that as on 4/2/2001 or 1/4/2001 the applicant was of the age of less than 18 years and, therefore, a juvenile under the new Act. He was entitled to be held as a juvenile and his trial was required to be separated. In support of these contentions the applicant has relied upon a Constitution Bench decision in the case of Pratap Singh v. State of Jharkhand **[(2005) 3 SCC 55]**. The majority opinion of the Constitution Bench decision has concluded the legal position as follows:

> (a) The reckoning date for determination of the age of the juvenile is the date of the offence and not the date when he is produced before the authority or in the Court, and
>
> (b) the 2000 Act would be applicable in a pending proceeding any Court / authority

initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1/4/2001.

26. The prosecution has filed affidavit-in-reply and opposed this application by reiterating that the accused was not a juvenile within the meaning of the old Act on the date of the offence and in any case he had not taken up such a plea at the time of filing of the charge-sheet when the Magistrate could have an opportunity to enquire into the same. Even at the time of committal proceedings such a plea was not raised and the accused remained silent though represented through an Advocate. Again after the committal order was passed and the accused was identified he did not take a plea that he was a juvenile. Same was the case when the charge was framed at Exhibit 5 and when his statement was recorded under Section 313 of Cr.P.C. In short it is contended that this plea of the accused that he is a juvenile cannot be now reopened in the appeal filed against the order of conviction and sentence.

27. We are afraid, this stand taken by the

prosecution is indefensible in view of the decision of the Constitution Bench in the case of Pratap Singh (Supra). As per the conclusions noted hereinabove, the 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and pending when the 2000 Act came into force and the person had not competed 18 years of age as on 1/4/2001. If the applicant's date of birth is accepted as 6/7/1983, it is clear that on 4/2/2001 as well as 1/4/2001 he was less than 18 years of age and thus a juvenile under the 2000 Act and entitled for the benefits of the said amended Act. However, the trial Court did not call upon the parties to lead evidence in support of the date of birth so that there was an opportunity for both the parties to place such evidence in support of their respective contentions. The learned Special Public Prosecution has placed before us photostat copies of the birth register of the concerned village for the month of July-August 1983 and submitted that as per the said register no child was recorded to have been born on 6/7/1983 and, therefore, the school leaving certificate submitted before the trial Court could not be sufficient evidence to hold that the applicant was born on 6/7/1983.

28. In the case of Vishnu alias Undrya vs. State of Maharashtra **[(2006) 1 SCC 283]** a similar issue i.e. determination of the age of a prosecutrix had fallen for consideration. The school leaving certificate issued by the municipal school had given the date of birth as 29/6/1963 whereas it was contended by the accused on the basis of the birth register maintained by the Greater Bombay Municipal Corporation and the register of Kashibai Hospital, Santa Cruz, Bombay that the prosecutrix was born on 29/11/1964. The school leaving certificate was discarded and the date of birth of the prosecutrix was held to be 29/11/1964 on the basis of the evidence of Pandurang (PW 1), the father and Vimal (PW 13), the mother of the prosecutrix. The said evidence was also corroborated by the testimony of Dr.Shashikant Avasare and, therefore, the prosecutrix (PW 4-Pushpa) was held to be born on 29/11/1964 based on the oral depositions of these three witnesses as well as the birth registers maintained by two different hospitals. Thus the issue of date of birth is required to be proved by leading evidence and this was not done by the trial Court as noted earlier in the instant case. The photo copies of the school

leaving certificates submitted by the applicant as well as the copies of the birth registers submitted by the prosecution cannot be accepted as evidence unless the parties have an opportunity to lead evidence and prove the date of birth. This can be more appropriately and efficaciously done by the trial Court. We do not agree with the submissions made by the learned Special Public Prosecutor that the issue of date of birth is foreclosed and that the accused was not born on 6/7/1983 or he failed to prove that he was born on that date. This is an issue which will have to be decided on adducing documentary as well as oral evidence before the trial Court. The certificate issued is of a private school and original or photostat copy cannot be accepted as reliable evidence unless the parties are allowed to lead evidence before the Court and the prosecution is given an opportunity to cross-examine the witnesses of the defence and also to bring on record evidence to the contra. Though by an interlocutory order passed in this Criminal Application the Police Officer was called upon to do the same, there are no findings which could be relied upon and we have no alternative but to direct the trial Court to provide an opportunity to both the parties to lead evidence

regarding the date of birth of the accused no.2 and record its finding on the same issue within a specific period. Until then the order of sentence will have to wait and if the accused is able to prove that he was less than 18 years of age as on 4/2/2001 or 1/4/2001, he would be a juvenile entitled for the benefits under the 2000 Act and will have to be sent to the Juvenile Board for further action as per the said Act. We, therefore, allow Criminal Application No.4389 of 2005 partly and direct the learned Addl. Sessions Judge at Pune to decide the date of birth of accused no.2 by allowing the prosecution as well as the defence to lead oral and documentary evidence. The parties shall appear before the learned Addl. Sessions Judge at Pune on 16/5/2006 and the findings on the said issue shall be recorded as expeditiously as possible and in any case within a period of eight weeks from that date. In case the findings of trial Court go against the accused/applicant, we shall have to hear him on the issue of sentence to be awarded to him, in addition to the challenge, if any, to the findings on the determination of age.

29. Now coming to the issue of sentence to be awarded to accused no.1, the learned counsel for the

accused no.1 vehemently urged before us that his case does not fall in the category of "rarest of the rare cases" so as to warrant the death penalty. It was submitted that the learned Addl. Sessions Judge did not take into consideration the aggravating and mitigating circumstances while awarding the death penalty. As per the learned counsel it was necessary for the trial Court to assess the mitigating circumstances by taking into consideration the tender age of the accused, the support to his widowed mother and the accused is the eldest child in the family. The trial Court has not addressed to the main issue whether the accused was beyond reformation and whether he had such characteristics as to pose danger to the entire society if he remained alive and in the jail. A number of decisions on these contentions have been referred to by the learned counsel and it was submitted that the death sentence is most unwarranted in the instant case. It was also pointed out that the culpability of the accused no.1 alone in killing of the victim was doubtful to the prosecution which failed to bring before the trial Court any clinching evidence to show that it was only accused no.1 who caused the murder and none of the other two accused had participated in the said act of killing

Rishikesh and in such a situation accused no.1 alone cannot be awarded death penalty. The reliance in this regard has been placed on the decisions in the case of Ronny @ Ronald James Alwaris & ors. v. State of Maharashtra **[(1998) 3 SCC 625]** and Shri Bhagwan v. State of Rajasthan **[2001 SCC (Cri) 1095]**.

30. In the case of Bachan Singh v. State of Punjab **[(1980) 2 SCC 684]** the majority opinion stated the following aggravating circumstances that could be taken into consideration while imposing the death penalty in its discretio, by the Court;

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the Armed Forces of the Union or of a member of any Police Force or of any public servant and was committed:

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such a member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, or had ceased to be such member or public servant;

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of Cr.P.C. or who had rendered assistance to a Magistrate or a police officer demanding his aid or required his assistance under Section 37 and Section 129 of the said Code.

. On the issue of mitigating circumstances the Apex Court accepted the following such circumstances to be taken into consideration:

(1) That the offence was committed under the

influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

. By following a majority view in Bachan Singh's case (Supra) a three-Judge Bench in the case of Machhi Singh v. State of Punjab **[AIR 1983 SC 957]** laid down the following propositions:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime and

provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

. The Court further stated that in order to apply these guidelines, inter alia, the following questions may be asked:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose

death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

. It is well settled position in law that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. **[Sevaka Perumal v. State of T.N. (1991) 3 SCC 471]**.

. The proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction, drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences. **[Shailesh Jasvantbhai v. State of Gujarat (2006) 2 SCC 359]**.

. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment

befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. **[Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220]**.

. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance. **[Ravji v. State of Rajasthan (1996) 2 SCC 175]**.

. In the case of Ram Anup Singh v. State of Bihar **[2002 SCC (Cri) 1466]**, uncle of the accused had only one daughter who was to inherit her father's

property. The appellants virtually annihilated the entire family of the uncle. A three-Judge Bench of the Supreme Court while setting aside the death sentence awarded to all the accused observed thus:

> "There is no evidence on record to suggest that the appellants are a menace to the society as evident by their past deeds. It is not possible to conclude that they are those who cannot be reformed or rehabilitated and that they constitute a continuing threat to the society. In fact, apart from the incident in question, there is not even an allegation about the appellants having indulged in such behaviour in the past or having resorted to violence and committed any offence whatsoever. They appear to belong to a middle class farmer family for whom land has great value. But even so, there is nothing to suggest that they may repeat such barbarism in future so that they would constitute a continuing threat to the society. Having regard to all the facts and circumstances, and also having regard to the fact that the evidence does not disclose the immediate cause of the incident, we do not

find it safe to confirm the sentence of death awarded by the High Court to Lallan Singh and Babban Singh."

31. In the instant case, the learned Addl. Sessions Judge in support of the death penalty awarded by him has set out the reasons in paragraph 68 of his judgment and the said para reads as under:

" The way the Accused No.1 Dnyaneshwar committed this crime after meticulous planning with the sole motive to kidnap Rishikesh after gaining his confidence through the computer class, to kill and even after killing him to continue to demand ransom amount from father of deceased Rishikesh, and his conduct through out the trial, speaks for his criminal tendencies. The circumstances do not give any hope that there is any possibility of reform in his case. Therefore balancing the circumstances both in favour of and against awarding of capital punishment, I find that it is a case, rarest of rare nature, which warrants extreme death penalty for the committing of murder of Rishikesh, to the

Accused No.1 Dnyaneshwar. This and no other penalty in the view of this Court would meet the ends of justice for this crime."

. The learned counsel for the accused no.1 is right in his submissions that the learned Addl. Sessions Judge did not record any finding as to whether the accused no.1 could be reformed or whether he posed a threat to the society if death penalty was not awarded to him. However, that by itself will not be a sufficient reason to set aside the death penalty and substitute it by life imprisonment. We have to independently weigh the aggravating and mitigating circumstances and consider whether the order of sentence of the Addl. Sessions Judge is required to be confirmed or varied so far as the accused no.1 is concerned.

32. The mitigating circumstances in this case and as pointed out by the learned counsel for the accused no.1 are as under:

(a) The accused was, at the time of crime, of the age of 22 to 23 years.

(b) He did not have any crime record nor was he a hardened criminal.

(c) He was a student studying in a college without any history of any misdemeanour noted in the college or in the village of his residence (Ambodi).

(d) He has a widowed mother and is the eldest child.

(e) The accused comes from a farmer's family though his mother seems to be employed and he was not known to be anti social or displayed any tendencies earlier indicating his criminal mind.

. As against the above mitigating circumstances, aggravating circumstances against the accused no.1 are as under:

(a) The entire operation of kidnapping / abduction, and murder of the victim was preplanned by purchasing salt and acquiring the cable wire as well as digging the pit with

the help of agri implements which were collected from neighbours in advance.

(b) It was a cold blooded murder of an innocent boy of the tender age of 13 years and there was no animosity or disputes between the victim and the accused or between the family members of the victim and the accused.

(c) There was no provocation on the part of the victim or the victim did not contribute in any way so as to enrage the accused to attack the victim and cause his death.

(d) The victim was murdered in a brutal and dastardly manner. He was enticed or misled and taken away by the accused no.1 on his vehicle to his agricultural land and was killed and buried on 4/2/2001 between 6.30 to 7 p.m. and all this was done to demand ransom from the victim's father who was a well known doctor at Saswad.

(e) After killing Rishikesh the accused no.1 made a false telephone call to the

victim's sister and gave his false identity i.e. he gave his name as Jagtap and informed that Rishikesh was with him and would return on the next day morning. The accused no.1 even did not disclose his correct identity to the victim. It appears that he disclosed his name to the victim as Rohit Jagtap.

(f) When the accused no.1 confessed of causing murder of a young boy to Pramod (PW 29), the accused no.1 did not disclose the identity of the victim and gave misleading statements regarding the circumstances in which the victim was killed.

(g) The accused no.1 had in fact rehearsed the words to be used for the demand of ransom while talking to the victim's father, and this is clear from Exh.44-A (note-book) and the handwriting therein was proved by evidence of Shri Jamir Bagwan (PW 4) read with evidence of Firoj Shaikh (PW 36).

(h) Even after killing Rishikesh, the accused no.1 started making telephone calls

from 5th February 2001 onwards demanding ransom and every time he made Dr.Mainkar (PW 38) to believe that Rishikesh was alive. The telephones he used for making ransom calls were located at different places and all these acts of the accused went to show that he is more than a hardened criminal, though he did not have any criminal record earlier. Even after brutally murdering Rishikesh, the accused no.1 was not shaken in any way when the continued his demand for ransom from 5/2/2001 to 8/2/2001 on telephone and every time he went on misleading Dr.Mainkar as well as the investigating machinery. The entire operation was meticulously planned and executed by the accused no.1.

(i) The accused abducted / kidnapped the victim and murdered him, buried his body for collecting ransom from Dr.Mainkar, an offence which did not fall within the ambit of Section 364A of IPC or any other provisions of IPC. The IPC knows the instances of kidnapping for ransom and if ransom is denied perhaps the victim is murdered. But in the instant case

the victim was first murdered with a determination to collect ransom from his parents, a unique case in that regard. The accused no.1 hired a labourer under the pretext that he was required to work at the sugarcane juice centre but in fact he was sought to be hired to go and collect the money bag that was to be deposited by Dr.Mainkar and when he refused to do so the accused no.1 snatched the amount of Rs.50/- given earlier by way of labour charges. The accused was not shaken or disturbed even after he had killed Rishikesh, leave alone showing any remorse or sympathy to the victim's parents. We have no doubt in our mind that the gravity or seriousness of the crimes committed by accused in the instant case are much more condemnable and dastardly than in the case of Dhananjoy Chatterjee (Supra). The learned Addl. Sessions Judge had sufficient opportunity to observe the behaviour of the accused no.1 during the trial of the case and he noted that the conduct of the accused no.1 through out the trial spoke for his criminal tendencies.

33. On assessing the entire evidence in the instant case we are more than satisfied that the chain of crimes proved by the prosecution and the manner in which the accused no.1 planned and executed them would render the sentence of imprisonment for life inadequate. We are also satisfied that the accused no.1 would continue to pose serious threats to the society if the order of death penalty is not confirmed and his unshaken behaviour right from the planning stage till he was taken in police custody or during the trial does not make us believe that he has the tendencies for reformation. This is, therefore, the rarest of rare case where the comparative assessment of mitigating and aggravating circumstances leaves us with no alternative but to confirm the death sentence and no other penalty would meet the ends of justice to the society at large.

34. In the premises, we allow the confirmation application and confirm the order of death sentence awarded to accused no.1 - Dnyaneshwar Suresh Borkar for the offence punishable under Section 302 of IPC by the learned Addl. Sessions Judge, Pune in Sessions Case No.236 of 2001. We further confirm the order of sentence passed by the learned Addl.

Sessions Judge against the accused no.1 for the offences punishable under Section 364 of IPC and Section 201 read with Section 34 of IPC. Thus the order of sentence passed by the learned Addl. Sessions Judge is hereby confirmed in toto against accused no.1 and consequently Appeal No.618 of 2005 filed by him is hereby dismissed.

. So far as accused no.2-Amit @ Babu Nanasaheb Bhandwalkar is concerned, while confirming the order of conviction against him under Section 302 read with Section 34 and Section 201 read with Section 34 of IPC in Sessions Case No.236 of 2001, Criminal Application No.4389 of 2005 is hereby partly allowed and the trial Court is directed to record its findings on the date of birth of the said accused after allowing the parties to adduce evidence. The parties shall appear before the learned Addl. Sessions Judge at Pune on 16/5/2006 and the findings on the said issue shall be recorded as expeditiously as possible and in any case within a period of eight weeks from that date and forward the same to this Court. Criminal Appeal No.38 of 2005 will be listed before us for further orders, immediately on receipt of the findings recorded by the learned Addl.

Sessions Judge regarding the age of accused no.2-Amit @ Bapu Nanasaheb Bhandwalkar.

. The R. & P. only to the extent of the application at Exhibit 35 filed in Sessions Case No.236 of 2001 and Criminal Application No.4389 of 2005 before this Court be forwarded to the learned Addl. Sessions Judge at Pune forthwith.

. Mr.Mohite, the learned counsel appearing for accused no.1 submitted an oral application for stay to the order passed against accused no.1 for a period of eight weeks, on account of the ensuing summer vacation for the Supreme Court.

. We allow the said application under Section 415(3) of Cr.P.C. and stay the order against accused no.1 for a period of eight weeks.

(SMT.R.S.DALVI,J.) (B.H.MARLAPALLE,J.)